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Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration

Jo Hunt and Jo Shaw

‘Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type Europe.’ (Stein, 1981: 1).

Over a quarter of a century ago, Czechoslovakia-born, US-based international law scholar Eric Stein was an early and influential academic voice drawing attention to the role of the European Court of Justice (the ‘Court’ or ECJ) as a champion of the integration process. Implicit in Stein’s work was the view that the new legal framework constructed by the Court – part international, part national, and crucially, part supranational – was a new legal order for a new political order. Law was, and is, not approached by academic lawyers simply as the *object* of integration. It is not simply a discrete field within which new common rules emerge, and in which new institutions and structures are created, through the processes of negotiating, adopting, implementing, exercising and enforcing new legal norms at the European Union (EU) and national levels. Law may also be perceived as an *agent* of integration (Dehousse and Weiler, 1990: 243). Indeed, for many lawyers, because of the focus of their disciplinary lenses, it

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is *the agent par excellence*, with the story of EU integration being explored as one of 'integration through law' (Cappelletti *et al*, 1985).

The exercise of new legal rights to live, to work, to trade, to study, to vote on the same terms as nationals of the destination state may have consequences in other domains, stimulating economic, social and political integration. At the constitutional level, the emergence of the new legal order, a process driven forward by the ECJ and its case law, creates a new species of constitutional framework which underpins the emerging political order. By using the language of constitutionalisation to describe this process of the creation of the new legal order, legal scholars may be seen to be making multiple, often implicit claims about the object of their study that warrant, and have been receiving, further attention. The first claim is that the system under creation reflects and respects constitutional practices. To put it another way, this is the claim that the legal system, and the political system it supports, are premised on liberal notions of limited government, and of the protection of individual human rights within this system. The second claim is that through borrowing from such state-like notions, the use of the language of constitutionalisation reflects the idea that the law, the Court(s) and the legal order are engaged in an on-going integrative process in which 'constitutionalisation' is used as a short-hand for 'rendering the EU more state-like'.

For well over a decade now, however, such images of the Court, the legal order and their role in the integration process have been under challenge, from both within and outside the legal academic community. From the latter, the assumptions of the integrative

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potential of law that were inherent in many lawyers' accounts have been questioned, particularly through the work of political scientists, whose own disciplinary orientations focus on a rather different set of questions than those which have engaged the legal community. As Conant states, for political scientists, 'scholarly interest in the politics of legal integration originated with the puzzle that a supranational court had transcended state sovereignty' (Conant, 2007: 45). For a majority of, but not all, lawyers the puzzle was perhaps not so much *how* this could have occurred but more one of *what*, in legal constitutional terms, had in fact taken place, how the resulting order could be defined, and what the consequences of it were for our received legal and constitutional categories and practices. Although constitutionalisation may be suggestive of progress towards something state-like, this outcome is certainly neither assumed nor advanced in most current legal scholarship, which seeks to find alternative modes of conceptualizing the nature of the EU legal order. Whilst political scientists have adopted a range of theoretical approaches – predominantly realist/intergovernmentalist, neofunctionalist, but also constructivist – to explore how 'legal integration' was able to occur (see reviews of this literature in Conant, 2007; Armstrong, 1998), there has also been an empirical challenge to the integrationist assumptions of a broader integration-through-law agenda, assumptions which have 'usually been made without thorough methodological inquiry or solid evidential backing' (de Búrca, 2005: 313). Such challenges can be found in both the legal and political science literatures. More critical questions are now asked, such as: what impact *in fact* has legal integration had upon actors in a range of policy sectors? Has

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integration-through-law actually occurred? Are new rights being respected and given effect to in practical terms? Are new networks and coalitions of actors emerging?

As de Búrca (*ibid*) explains, there is inevitably something of a disciplinary scepticism held by one academic community towards another. For political scientists, 'legal scholarship often appears arid, technical, atheoretical ... full of unproven or unstated assumptions, lacking empirical support and seemingly disinterested in the actual dynamics of political and social change'. To lawyers meanwhile, much political science work appears 'woefully misinformed about law and the legal process, simplistic if not crude, stating the obvious as if newly discovered' (Alter *et al*, 2002: 114). Armstrong sums up the disciplinary cross-talk from a lawyer's perspective with the question 'political scientists have discovered the Court of Justice, but have they discovered law?' (Armstrong, 1998: 155).

It is of course axiomatic that lawyers should consider that 'law matters'. However, whilst the normative force of law offers one explanation for why law matters, it would be wrong to assume that academic lawyers will neglect to take explanatory enquiry into outcomes any further. Many are engaged with the task of providing convincing accounts of why law matters: of how law and legal frameworks structure and constrain; how political actors engage with the law and translate political claims into legal language, having to modulate objectives to fit into appropriate legally recognized categories with currency before the courts; indeed how the very concept of 'law' is conceived and experienced by the range of actors that are involved in its operation. Rather than being concerned

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exclusively or indeed primarily with doctrinal exposition, much legal scholarship engages with questions of how and why the law may be more than the functional handmaiden of political actors. In the next section a brief overview of the range of legal work being undertaken on the EU is provided, and it will be demonstrated that for many academic lawyers, European legal studies is about far more than what courts do. In a third section the focus returns to what is the main point of connection for a range of disciplines addressing law in the integration process, and will consider lawyers' accounts of the role of the Court. Here too it will be shown that there has been a significant questioning of the 'heroic' vision of the Court, and of the existence of an inherently integrative constitutionalisation process – not everyone subscribes to the fairy tale of Luxembourg. Finally, the chapter concludes with some assessments of EU legal scholarship to date, and suggestions as to its future potential.

General Developments in EC/EU Legal Scholarship

Walker, one of the foremost legal theorists working on EU law, has highlighted what he describes as a tendency towards 'a reactive, event-driven and context-dependent approach to EU legal studies' (Walker, 2005: 583). If this is a criticism of EU legal scholarship, then it is somewhat unfair. The EU, after all, is a polity in the making, and it is understandable that scholars will seek to make sense of its ever emerging, evolving dimensions. The scope of what may be included under the heading 'EU legal studies' is vast. Echoing a more extended review by Shaw (2005), all that is offered here is a snapshot. Thus EU legal studies could include a focus on the EU's constitutional order,

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including its interactions with national level constitutional orders; or on the EU's place in the world as an international actor, in trade matters, in defence and foreign policy; or it could cover studies of specific policy sectors, such as the environment, social policy, competition, health care, with the lens turned to the EU level as well as (most usually one, given linguistic and legal cultural considerations) national systems and analyzing the processes of legal norm reception, usage and feedback, revealing, across different policy sectors and different states, variegated patterns of the degree and depth of EU law's reach; or finally, returning to the supranational level, it could focus on the use of administrative governance techniques and the role of law in such processes, or on other uses of policy-steering tools which fall outside the traditional European Community (EC) legislative method, providing assessments of their domestic impacts. In many ways, more recent scholarship often transcends the Court-centred emphasis of early years of EU legal scholarship. Legislators, administrators, committees and the full range of those who are affected by policy-steering exercises using law and alternatives to law may be brought into focus.

In terms of methodological approaches and theoretical assumptions, the field is again open. Many academic lawyers will have come to the study of EU law from other sub-disciplines in law, most notably international law, as well as public law, and private law, and these backgrounds will often frame their engagement with EU legal studies and how they conceive of their subject for study, and formulate the questions to be asked and the conclusions to be drawn. For some, the EU remains to be analysed as an international

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organization. For others, it may be compared with a domestic polity. Yet others will embrace the concept of a multi-level governance regime. Snyder, writing in 1990, drew attention to the fact that 'European Community law represents more evidently perhaps than most other subjects an intricate web of politics, economics and law ... which virtually calls out to be understood by ...an interdisciplinary, contextual or critical approach' (Snyder, 1990: [167](#)). This call has elicited a significant response from the legal academic community, as scrutiny of the pages of journals such as the 'law-in-context' *European Law Journal* will attest. This response is most notable in work published in the English language, though such work is not necessarily undertaken by those trained and working in the UK or the US. The imprint of the intellectual heritage of the European University Institute (which founded the *European Law Journal*) is significant, and this institution has now bred generations of law-in-context scholars, working mainly in English, though initially trained in other EU states, and beyond.

Doctrinal exegesis remains important, as scholars map the relevant legal and quasi-legal terrain, seeking to identify points of consistency and coherence, as well as inconsistencies and incoherencies in legal regimes. The doctrinal tradition remains particularly strong outside the UK and US, where links between legal academia and the legal professions are more deeply entrenched, though this stereotype is being challenged with broader contextual work being brought to an English language audience through initiatives such as those of the Jean Monnet Program at New York University, which has recently

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published two symposia on *European Legal Integration: New German Scholarship* (Von Bogdandy and Weiler, 2003) and *New Italian Scholarship* (Toniatti and Weiler, 2007).

Once the doctrinal underpinnings are in place in a subject area, critique may then come from a range of vantage points, including morality (Weiler, 1992), economic efficiency (Tridimas and Tridimas, 2002), the law's social or political implications (including feminist and queer theory readings), and its effectiveness and legitimacy (Arnall and Wincott, 2003; Smismans, 2004). 'Legal' work may engage explicitly with a critical legal scholarship agenda (Everson and Eisner, 2007), social theory (Shaw, 1999; Sideri, 2005) and political theory (MacCormick, 1999), and may also seek to explore how the law works in practice, through socio-legal work making use of social science methodologies (Lange, 2005). Lawyers are often of course also engaged in collaborative research projects, across states and across disciplines.

Some, but not all, will work within the framework of a positivist approach to law. The 'law' under such a view covers those measures and practices which carry the formal designation of law, which have been ascribed this status through their creation by recognized law-making bodies. But non-positivist accounts are also present, i.e. accounts which approach 'law' as being defined through normative social practices (de Búrca, 2005). Such approaches can call into question the very legal nature of the policy instruments being used. The turn to 'new governance' opens up new fields of enquiry for lawyers as they investigate the relationship between law and alternatives to law. Walker and de Búrca (2007) remind us however that, in this investigation, a clearer conceptual

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understanding needs to be reached about the nature of law and new governance tools. We should not be too quick to assume that the study of 'new governance' necessarily embraces a positivist notion of law.

The umbrella term 'new governance' covers a range of non-legislative interventions – including soft law, the open method of co-ordination, and, as Curtin (2006) amongst others identifies, the rise of executive power in the EU, seen with the use of comitology and an increasing involvement of agencies. To the extent that these bodies fall outside the traditional scope of lawyers' concerns with hard legislative enactments, Curtin questions the role for law and lawyers in the new context, asking whether 'law' and 'lawyers' still have a significant role to play in the contemporary phase and form of European political integration? If so, what type of role? And how does – and should – that role tak[e] shape in an emerging political system?' (Curtin, 2006: 3). For Curtin, the answer is that lawyers can contribute to 'designing accountability mechanisms that are tailored to fit contemporary realities' (*ibid*: 37). The turn to new governance, and away from established notions of law, does not mark the first time in the history of EU legal studies that something akin to a 'crisis' has been identified. Shaw (1996) considered the increasing fragmentation and disintegration in the EU legal order as a challenge to received notions of a coherent and cohesive legal order, progressing in a unilinear direction towards greater integration. This challenge, as Shaw argues, may be accommodated by breaking the intuitive link between law and integration that had dominated much legal work until that point. As such, there are strands of work within the

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legal academy which see the EU being approached as a mature system of governance. As disciplinary developments since the early 1990s have shown, such turns have been accommodated in EU legal studies, and rather than signalling a crisis, the recognition of challenges to the dominant model of law and legal integration received from those working in decades past open up the vista to more nuanced, innovative engagements with the place and role of law.

The Court as a Constitutional Actor: Retellings of the Fairy Tale

At this stage however, we will step back to the dominant received model of law, its role in integration, and the place of the ECJ in the constitutionalisation process, charting in more detail how this 'fairy tale' has been retold by a range of EU legal scholars.

All students of EU law are steeped in the canon of familiar cases which are strung together in a legal narrative that tells the story of the Court's constitutionalisation of the Treaty establishing the European Community (TEC). Starting with *Van Gend en Loos* (European Court of Justice, 1963) and *Costa v ENEL* (European Court of Justice, 1964), it tells how the Court, through its judicial pronouncements, created a set of principles which structure the EU legal order. Through these early, crucial interventions, the Court recognized the possibility of the direct effect of Community law, thereby creating a framework in which rights derived from Community law could, under certain circumstances, be relied on directly before national courts. Further, these Community law rights are to be regarded as supreme, thereby trumping conflicting national law, of

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whatever status. The Court subsequently developed a set of legal principles on the operation and effectiveness of remedies for the breach of EC law at national level, going so far as to construct a right to damages for individuals in the event of a sufficiently serious breach of EC law by the Member States. Additionally, the Court was to expand on the review of legality of Community acts with which it was charged under Article 230 TEC, identifying a set of overarching 'general principles', including fundamental human rights, which could operate as legally enforceable constraints on the exercise of power by the EC institutions, and also by the member states in the context of their application of EC law. In this way, it developed for itself a role as a court of constitutional review, famously proclaiming in *Parti Ecologiste 'Les Verts'* that the EC 'is a Community based on the rule of law, in as much as neither its Member States nor its institutions can avoid a review of the question of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty' (European Court of Justice, 1986). Added to this has been the Court's role in determining the extent of the EC's internal and external competences, fixing the outer limits of the legitimate exercise of the EC's attributed powers.

The Court has been conventionally perceived as a motor of integration, driving the Community ever onward towards further and deeper integration. Whether the Court has been presented as hero or villain – the latter most notably by Rasmussen (1986) in his account of the Court which presents it as acting well beyond the text of the Treaties and, indeed, the boundaries of permissible judicial interpretation – it is nonetheless seen as

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having made a critical, determinative impact, though some would argue strongly that the Court's role as an innovative interpreter of the law has been exaggerated (e.g. Baquero Cruz, 2006). The steady accretion of constitutionalising case law over the years may be presented as the inevitable achievement of what Pierre Pescatore, a former ECJ judge, has termed '*une certaine idée de l'Europe*' (1983: 157) coded into its legal system and as according with some blueprint to which the Court is tirelessly working.

As Vauchez (2008) convincingly demonstrates, the hegemony of what he terms this 'Europeanization-through-case-law' narrative owes much to the identities of those involved in the first decades of the EU's operation. Vauchez's detailed and sensitive history of the development of the mythology surrounding the 'magic triangle' of direct effect, supremacy and the preliminary ruling procedure reveals that 'many of the most prominent EU actors [at the Court, in the Commission, and the institutions' Legal Services] were often at the same time academics, most of them legal scholars, playing on both sides of the fence' (ibid: note 6). As important as the judgments themselves were, the public retellings of the judgments, at conferences and in academic commentaries, and the drawing-out of a specific set of legal and constitutional implications by a group of actors who had a real interest in reinforcing the significance of the law and courts for integration are clearly linked. Walker too has highlighted the 'missionary zeal' that many commentators brought to their work on European integration (2005; 586). The timing of the critical direct effect and supremacy cases was also significant, according to Vauchez, coming at a time when integration through legislative harmonization was beginning to

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appear an impossibility. The promise of a judicial contribution to integration was thus particularly welcomed, and championed. The strength of the mythology which built up around these cases, and also from further evidence from later cases which could be used to support the central claim, thus ensured that it remained the dominant narrative for a number of decades.

However, such an account has been demonstrated as being based on assumptions about the Court and the law which are open to question. Such assumptions have been shown to be partial and fallacious, as they overstate the integrative capacity of law, and posit a view of the case law as progressing ineluctably to a particular constitutional *finalité*. They are also unhelpful in that the rhetoric of constitutionalisation ascribed to the Court's activities was taken as the starting point in the negotiations and drafting work which led to the 2004 *Treaty establishing a Constitution for Europe* (the 'Constitutional Treaty'), a process which revealed the judicial constitution to be out of step, and to be irreconcilable, with social and political reality.

That caution should be exercised in accepting the simplified constitutional narrative was a point raised in the late 1970s by Shapiro. He launched a critique on conventional lawyerly accounts of constitutionalisation by the Court as being:

'constitutional law without politics... [which] presents the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct

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implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology' (Shapiro, 1979-1980: 538).

Picking up this critique, Shaw challenged the assumption underpinning many accounts of the Court which posits 'an immutable link between law and legal processes and integration', where the latter 'is conventionally if somewhat simplistically understood as a process leading towards greater centralization of governmental functions' (Shaw, 1995: 3). Shaw asserts that 'the role of law and of the Court in feeding integration processes is taken for granted, and frequently overstated' (1995: 4), whilst the true picture is significantly more complex. Wincott (1995a: 298) similarly critiques the 'inevitability of the constitutionalisation of Community law' apparent in some doctrinal accounts, which writes out politics and agency, and assumes a 'linear progression towards ever closer union'. Clearly, Shaw and Wincott are not denying that the Court has handed down judgments of constitutional significance, but they highlight that attempts to present this as an inevitable, inexorable move towards further integration would be wrong, and that an easy reliance on the Court as a constitutional champion is misplaced.

A major corrective to conventional constitutional accounts has been in the growth of work which focuses on the environment in which the Court operates, on its interlocutors (Weiler, 1994), and, most significantly, on the relationships between them. Key amongst these interrelationships are those between the ECJ and national courts and the resulting interconnections between the 'EU' and national legal orders. Whilst the ECJ may

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formally present an image of a unified and cohesive EU legal order, with it and its law at the pinnacle, national takes on this may be very different. This was clearly seen in the context of the creation of the failed Constitutional Treaty, which involved attempts to formalise and concretise certain constitutional doctrines which formerly existed solely in the Court's jurisprudence and which had been 'received' with varying degrees of enthusiasm and consistency by the national courts. These doctrines had never, as such, been held up to a binary accept/reject determination on the part of member state governments. It is in relation to the principle of primacy, or supremacy, where we see the most glaring mismatch between the conventional rhetoric of judicial constitutionalism clashing with other legal and political realities. A privileging of the Court's jurisprudence presents Community law supremacy as an essential, fundamental and unconditional aspect of the legal order. The Court of course ruled in *Internationale Handelsgesellschaft* (European Court of Justice, 1970) that provisions of Community law held supremacy over national constitutional provisions. A majority of member states, however, would not share this view. Their courts' understandings of supremacy are conditional, and the ECJ's rulings are refracted through their own national constitutional lenses (Slaughter *et al*, 1997). Some indeed have had the opportunity to make explicit their rejection of EC law supremacy over their constitutions.

According to the conventional constitutional rhetoric, however, such positions by member state courts could be regarded as temporary aberrations, with the expectation that they will eventually fall into line. What such views fail to capture is that the

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conditionality attached to supremacy is not a temporary aberration, but a permanent feature of the EU constitutional order. As Maduro warned, the idea of 'constitutional tolerance' (Weiler, 2003), whereby the ECJ and national courts are complicit in engaging in a practice of avoiding constitutional conflicts may be 'as good as it gets' when trying to fix the relationship between EU and national law (Maduro, 2003). The drafting history of the supremacy clause is instructive here. The first drafts of the proposed Constitutional Treaty provided that the law of the EU would be supreme over the law and constitutions of the Member States. The final text, contained in Article I-6, merely provided that 'the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'. Although a Declaration appended to the Treaty went on to state that the provision was simply a codification of existing case law, the absence of the reference to the Constitutions of the Member States certainly allowed for an ambiguity not provided for in the Court's own jurisprudence. In any event, the minimalist solution settled upon in the Treaty of Lisbon sees the principle of supremacy removed entirely from the text of the Treaty, though it features as a Declaration, which merely carries interpretative force.

Of course, that ambiguities and controversies existed over the scope of the supremacy principle is unsurprising. The Court's version of supremacy is only one version of this story, told for particular purposes. Whilst this version has tended to be privileged and reified in some EU law writing, it simply does not capture the complexity, the mixed 'in-between-ness' of the EU constitutional order. An alternative version has been gaining

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ascendancy in academic writing over the past decade, drawing on the idea of constitutional pluralism, and presenting the relationships between the EU and national orders as 'pluralistic rather than monistic, and interactive rather than hierarchical' (MacCormick, 1999: 118; see also Walker, 2002). Fixing a matter such as the primacy of EU law over national constitutional provisions definitively and unconditionally in a constitution would, according to Shaw, 'require something akin to a constitutional revolution in Europe and in the Member States' (Shaw, 2004: 237). Rather than taking the constitutionally impossible step of concretising the position of the Court and its legal order, removing the indeterminacy of the system, and establishing definitively the status of the Court and the effects of its rulings, the settlement reached in the Constitutional Treaty left these issues open and indeterminate, rejecting the maximalist view of the Court's constitution. Such developments are easily incorporated into pluralist visions of the EU and national legal orders. However, the search for measures of 'good governance' against which to assess the operation of the mixed constitutional order again comes up against the state/international organisation dichotomy: where should we look for the relevant measures and are they transferable from the state-level to the EU? A note of caution on this point is sounded amongst certain authors (e.g. Shaw, 1999; Walker, 2003).

What academics have laid bare is that the relationships between courts are a crucial element in revealing the dynamics of the processes of integration and in identifying the legal constitutional nature of the resulting order. Authors have also concentrated on

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demonstrating the importance of other elements of the context and environment in which the Court as a judicial actor operates, an environment that is by no means under the control of the Court of Justice (Wincott, 1995b). Similarly, Armstrong's approach reflects an understanding that the Court's jurisprudence 'should not be conceived of in terms of fidelity to a foundational Member State bargain, nor to a preordained teleology of integration, but rather to an attempt to mediate between law and its environment' (Armstrong, 1998: 156). In this environment, the Court's identity as a judicial institution is paramount: to ensure its legitimacy *qua* judicial authority, it has to be seen to be operating according to legal processes and norms of appropriateness. The Court's rulings have to fulfil certain basic requirements so as to satisfy the demands of 'internal' or legal legitimacy (Bengoetxea *et al*, 2001). These would include the sources used by it in reaching its judgment and the nature of its reasoning processes. A judgment which is internally justifiable according to legal norms will not necessarily be externally justifiable, in the sense of being considered ethically, politically or ideologically acceptable by other actors. That is not to say that the Court operates in an apolitical vacuum, of course. External forces may well prove important, but these have to be fed into, and responded to, within the context of the Court operating as a legal institution. The Court operates within a dense network of policy actors, including referring courts, national supreme and constitutional courts, the Commission, Advocates General, member state governments and litigants. Some of these actors have a particularly privileged place in the Court's institutional structure, enabling them ready access to participate in cases,

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presenting the Court with their own perspectives on the 'correct' response in particular case, and feeding into an ongoing, iterative process of policy, and polity, development.

Important recent work has seen attention turn to assessments of the contributions made to the direction of the Court's case law by the submissions of Advocates General (Burrows and Greaves, 2007) as well as of the Member State governments, through the observations made before the Court (Granger, 2004) in a range of policy sectors.

However, it is perhaps significant and reflective of the residual strength of the autonomous, heroic view of the Court to note how little attention lawyers have placed on the important interchanges which have taken place between Commission and Court since Stein (1981) identified the former's apparent contribution. Reviewing the then extant corpus of constitutionalising cases, Stein demonstrated that in all but two of the eleven cases, the Court's judgments accorded with the views presented by the legal service of the Commission. Indeed, it was the Commission which had introduced to the Court in *Van Gend en Loos* the idea of the Community system as a new legal order, and had argued strongly for the recognition of direct effect of Community law provisions. In fact, the Court stopped short of the Commission's position in this case, which sought acknowledgement of the supremacy principle, though of course this was later to come in *Costa v ENEL*. Stein views the Court as having been 'led' by the Commission, their close alliance 'probably alleviat[ing] some of the concern members of the Court may have felt regarding the legitimacy and acceptance of its rulings' (Stein, 1981: 24). All this should not be taken as assuming that the Court is in some way captured by the political actors in

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the field. It is not simply the agent to their principal. Rather, it will be aware of its political environment, of what is presented as politically appropriate, and may seek to incorporate such views when exercising its judicial functions.

Just as there were particular views held by the members of the Legal Service of the Commission, it is of course relevant to consider the views held and approaches taken by the members of the Court at a particular time. Sometimes these may well coalesce around '*une certaine idée de l'Europe*' which is shared by certain other political actors.

Particular views may be deeply embedded in the system, such as the attainment of effectiveness and coherence in the legal order, while others may be more policy-specific, reflecting particular political and economic ideologies. Such principles and values could include for example, the achievement of the goal of market integration, fair competition, and respect for family life. However, such principles should not necessarily be seen as static, or all powerful, as they respond to the changing values of the time and to the shifting composition of the Court. The importance of judicial backgrounds was averred to by another former Judge of the Court, Ulrich Everling, who, in the mid 1980s, suggested the Court's 'increasingly cautious' approach to laying down general principles was in part due to 'the arrival of judges from the common law tradition schooled in case law and inclined to a pragmatic approach' (Everling, 1983-84: 1301).

As has already been seen, a further corrective to the conventional constitutionalisation approach was Shaw's recognition of *disintegration* in the EU legal order, the counterpoint to increasing centralization, apparent, for example, in the EU's fragmented

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pillars, and, within the EC pillar, in the space for difference and diversity reflected in the norms, tools and techniques of the law. These include the principle of subsidiarity, but also in longer-standing elements, such as the space afforded national variation by directives. Such elements are presented 'not as *exceptions* to an integrationist norm, but as autonomous facets of the whole' (Shaw, 1996: 241). Over a decade later, the disintegrative elements in the EU order are more pronounced, or at least, more acknowledged by legal commentators. Disintegration becomes normalized, as accounts of the Court and the legal order have matured. The assumption that the Court seeks 'to expand the scope of supranational governance' – claimed to be 'implicitly shared by nearly all legal scholars' (Stone Sweet, 2003: 25) – is increasingly untenable, as seen by the cases in which it has resisted centralizing tendencies (European Court of Justice, 1996 and 2000). Nor, it should be noted, has the Court pursued all lines so as to reinforce its own constitutional role. It famously has chosen not to facilitate the route to the Court for direct challenges to the legality of Community measures for 'non-privileged' actors under Article 230 TEC. As Schepel and Blankenburg point out, it has 'refrained from turning Article [230] into a vehicle of general constitutional review'. Further:

'[a] court that wants to engage in lawmaking usually transforms its courtroom into a legislative assembly – allowing class actions, public interest litigation, popular constitutional complaints, *Brandeis* briefs. The most striking feature of the ECJ's case law is that it has resisted all of these' (Schepel and Blankenburg, 2001: 41).

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In short, legal scholarship has shown that whilst ‘constitutionalisation’ may be a consequence of the activities of the Court, it is little more than a label – and a contested one at that (Avbelj, 2008) – holding many meanings which may be ascribed to the various judgments which have had a structuring impact on the nature of the EU legal order. The Court is intimately connected with a range of other legal and political actors in this structuring process, and a more nuanced and conditional view of its contribution is necessary. Certainly, ‘constitutionalisation’ should not be seen as some inherent logic within the legal system, driving the Court – and the integration process – ever forward.

Conclusions: Assessing EU Legal Scholarship

Fifty years on from the birth of the discipline, EU legal studies is a wide ranging enterprise, engaging with the full range of legal and quasi-legal phenomena connected with the operation of the EU, at international, transnational, supranational, national and regional levels. Traditional doctrinal approaches remain an important part of the academic lawyers’ tool kit, and a functional demand for such skills remains strong amongst academic lawyers given their role in the training of new generations of practicing lawyers. However, work since the early 1990s in particular reflects a pluralism of approaches and intellectual influences, drawing on the eclecticism of discipline of legal studies itself which was certainly not visible before 1990. The subject can be cut in an almost endless variety of ways, and approached from any number of theoretical perspectives, with the result that there is simply no single answer to questions such as: what is the legal constitutional nature of the EU, and what is the role of the law in the

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governance of the EU? To give just one example, positivist, doctrinal approaches may be suggestive of one particular set of answers to these questions, but these may be expected to vary significantly from one policy area to another, and indeed from one state to another.

Arguably, despite the evolution under way in EU legal studies in terms of theoretical engagement, there remains significant scope for legal scholars to engage usefully in more constructive efforts towards theory-building, connecting their work more self-consciously and consistently to well-established or newly emerging currents of theory. To continue the rather parochial, UK-centric view employed in this chapter, initiatives such as those from a consortium of UK universities to develop a doctoral training programme for candidates in EU (and international) law requiring them to engage specifically with theory and methodology must be welcomed (Cryer *et al*, 2006). Future generations of EU legal scholars trained in this way will have a clearer appreciation at least of the assumptions that may otherwise be unselfconsciously and unwittingly brought to their work, attuning them to be more explicit in how and why law may be shown to matter in processes of EU governance, with broader benefits for all those engaged in understanding the EU, whatever their disciplinary perspective.

In terms of the relationship between EU law and other branches of legal scholarship, there is of course already much crossover. Those with interests in specific policy fields at national level – e.g. employment law, social security law and competition law – must make themselves aware of EU developments, and with the evolving policy reach of the

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EU into new fields this is becoming necessary for greater numbers of scholars. The pages of journals devoted to such specific policy fields, from the *Company Lawyer* through the *Industrial Law Journal* to the *Journal of Social Welfare and Family Law* regularly feature articles and case commentaries on EU legal developments. 'EU law' must not be approached as something separate and distinct from the legal orders of the member states. It is, after all, regularly incorporated and applied as national law, though its EU origins bring with it additional considerations that must be factored into accounts and assessments of the corpus of law on any issue at national level.

Walker (2005) has suggested that there may be rather too much of a tendency for some academic EU lawyers to reject the insights and theoretical tools of those working within a national law or international law frame, given a belief in the EU's exceptionalism, of its *sui generis* nature. Certainly, many would argue that there is good reason not to be too ready to apply the approaches from one level to another. But that does not mean that the insights derived from EU legal scholarship cannot have consequences for or understanding of legal categories and concepts operating at a national or international level. Within the field of public law in particular, there exists a necessary engagement with the impact of EU law, and with the insights derived from EU legal studies, on national administrative law, judicial review and constitutional law (Birkinshaw, 2003; Harlow, 2004). EU legal scholarship has challenged many of the shibboleths of national and international law, contesting received notions of concepts such as sovereignty, citizenship and statehood, which may ultimately lead to new reflections on these notions

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by scholars operating outside the EU framework.

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